Community Policy Forum

A BRIEFING PAPER FROM COMMUNITY POLICY FORUM

THE ONLINE SAFETY BILL: PRESS REGULATION, HUMAN RIGHTS, AND DEMOCRACY

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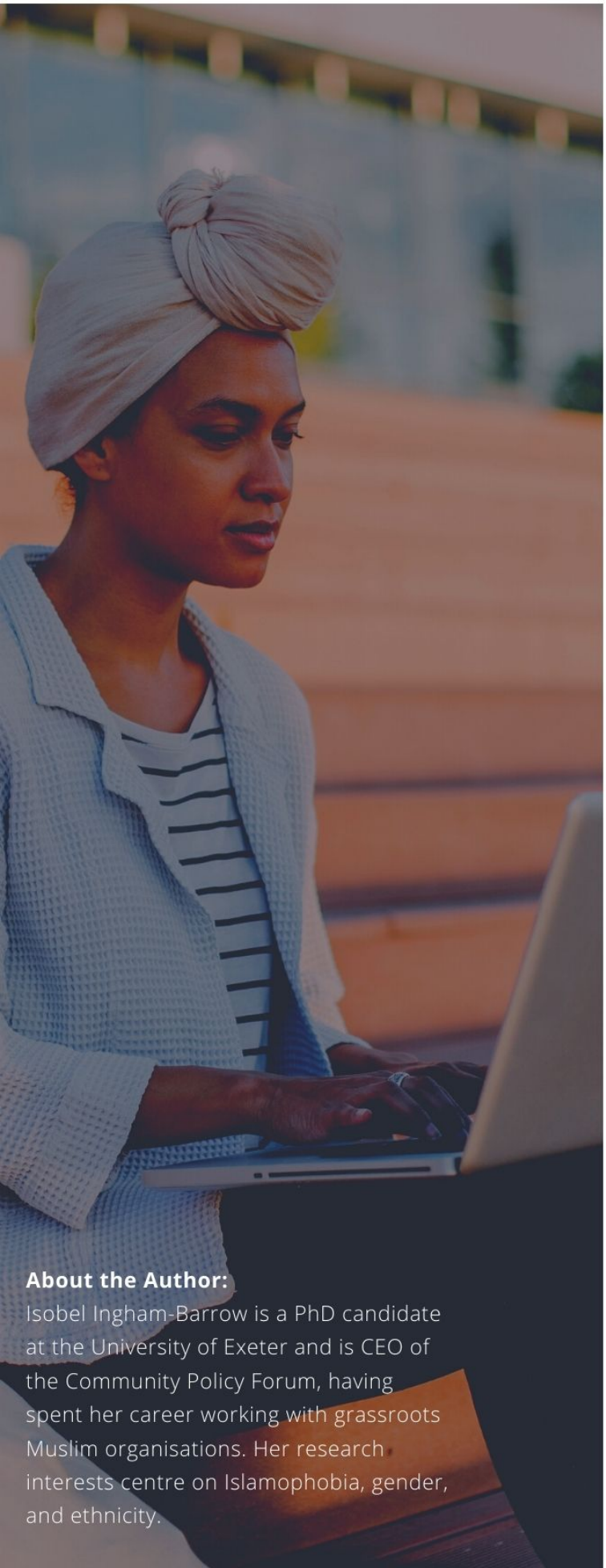

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Community Policy Forum

The Community Policy Forum is an independent think-tank seeking to promote evidence-based and community-centred approaches to issues concerning Islamophobia and structural inequalities facing British Muslim communities. We attempt this through connecting policymakers with academic research and experts and through providing platforms for engagement with diverse Muslim voices on areas of contemporary importance.

Executive SUMMARY

With the Online Safety Bill currently undergoing Parliamentary scrutiny, there is potential for immense positive change to be enacted for the benefit of protecting online users from a multitude of harms and abuses currently prolific in online spaces. However, in its current form, there are key areas of the bill that must be addressed if it is to be fit for purpose.

The remit of this briefing limits itself to three key overlapping themes:

- The potential of the bill to compound existing confusion and failings within the current press regulation system.
- The bill's flawed approach to protecting democratic principles.
- The bill's inadequate provisions to protect groups with protected characteristics designated under the Equality Act 2010.

Press and Comment Section Exemptions

Section 49(2) excludes news publisher content originating from a "recognised news publisher" from regulation. However, the broad definition of a recognised news publisher found under Section 50(2) leaves considerable scope for malicious entities to establish themselves under the guise of a news publisher and remove themselves from meaningful regulation.

Moreover, this will compound an already convoluted and inconsistent press regulation system that, as highlighted by the Press Recognition Panel, is already failing to protect the public from press harms.

The Online Safety Bill could be an opportunity to strengthen journalistic standards by bringing online and social media news publishers under the Royal Charter. Failure to do so merely risks increasing the complexity of an already confusing landscape and leaves vast swathes of online content unregulated.

At the same time, the exclusion of comments sections seems illogical and inconsistent considering the fact that comments sections on newspaper websites act in much as the same way as conversational spaces on other online platforms. Moreover, it is within newspaper comments sections that some of the most egregious forms of racism, Islamophobia, anti-semitism, xenophobia, sexism,

homophobia, and anti-trans sentiments are found.

Conflicting Harms and Democratic Principles

While attempting to prioritise democratic expression, the bill fails to engage with existing inequalities that actively prevent a variety of groups from engaging in democratic discourse on an equal footing. Notably, the definition provided for content of democratic importance in Section 15(6) is exceptionally vague, leaving significant concern of abuse and raising concern that a two-tier approach to free expression entitlements, with politicians and journalists being given significant lenience in comparison with ordinary citizens, despite potentially representing speech that carries the greatest harm and a reach that far exceeds the average user.

Instead, the bill should take its lead from the approach found in Article 10 and Section 12 of the Human Rights Act 1998. The protections afforded by the Human Rights Act provide enhanced protection for the freedom of expression, whilst acknowledging that it is a qualified right and thus provides a mechanism to carefully balance conflicting rights and ensure that any restriction is lawful, necessary, and proportionate.

At the same time, the powers granted to the Secretary of State surrounding the designation of priority content, their role in the drafting of the Ofcom code of practice, and their ability to revise the online safety objectives are cause for concern. As a result, attention should be paid to the Secretary of State's control over Ofcom and whether its independence can be fully assured.

At the same time, the broad definition of harm outlined within Section 187 of the bill and the lack of clarity provided regarding the specific types of harm that will be covered exposes a potential for certain forms of harm to be overlooked. Furthermore, there is a lack of detail provided regarding how specific groups are to be consulted and engaged within Ofcom's process of drafting guidance.

Consequently, from both the perspective of ill-defined types of harm and from the potential for political interference, the lack of clarity surrounding the definition of harm will disproportionately impact already marginalised communities who experience existing barriers to online engagement, either through targeted harassment or disproportionate policing online.

Recommendations

PART III SECTION 49(2)E OF THE BILL BE AMENDED TO OMIT THE EXEMPTION FOR COMMENTS AND REVIEWS ON PROVIDER CONTENT.

PART III SECTION 50(2) IS AMENDED TO STIPULATE THAT RECOGNISED NEWS PUBLISHERS ARE DEFINED AS ONLY THOSE WHICH ARE REGULATED BY A RECOGNISED REGULATOR UNDER THE ROYAL CHARTER SYSTEM.

THE PROTECTION FOR CONTENT OF DEMOCRATIC IMPORTANCE IN SECTION 15 IS REMOVED.

THE ONLINE SAFETY OBJECTIVES ARE UPDATED TO INCLUDE EXPLICIT PROTECTION FOR HUMAN RIGHTS IN LINE WITH THE HUMAN RIGHTS ACT AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS.

PLANS TO OVERHAUL THE HUMAN RIGHTS ACT ARE SCRAPPED.

THE POWERS GRANTED TO THE SECRETARY OF STATE TO DIRECT OFCOM BE REMOVED, WITH THE SINGULAR EXCEPTION OF MATTERS RELATING TO NATIONAL SECURITY.

In 2019 the UK Government committed to making the UK "the safest place in the world to go online". Almost three years later, this pledge has culminated in the Online Safety Bill.

The Online Safety Bill establishes a new regulatory framework, under which Ofcom is charged with holding online service providers to account in acting to reduce harm against their users. According to the House of Commons' analysis of the bill, it incorporates several key policy objectives:

- Increasing user safety.
- Protecting freedom of speech.
- Enhancing the ability of law enforcement to tackle illegal content online.
- And improving society's understanding of online harms.

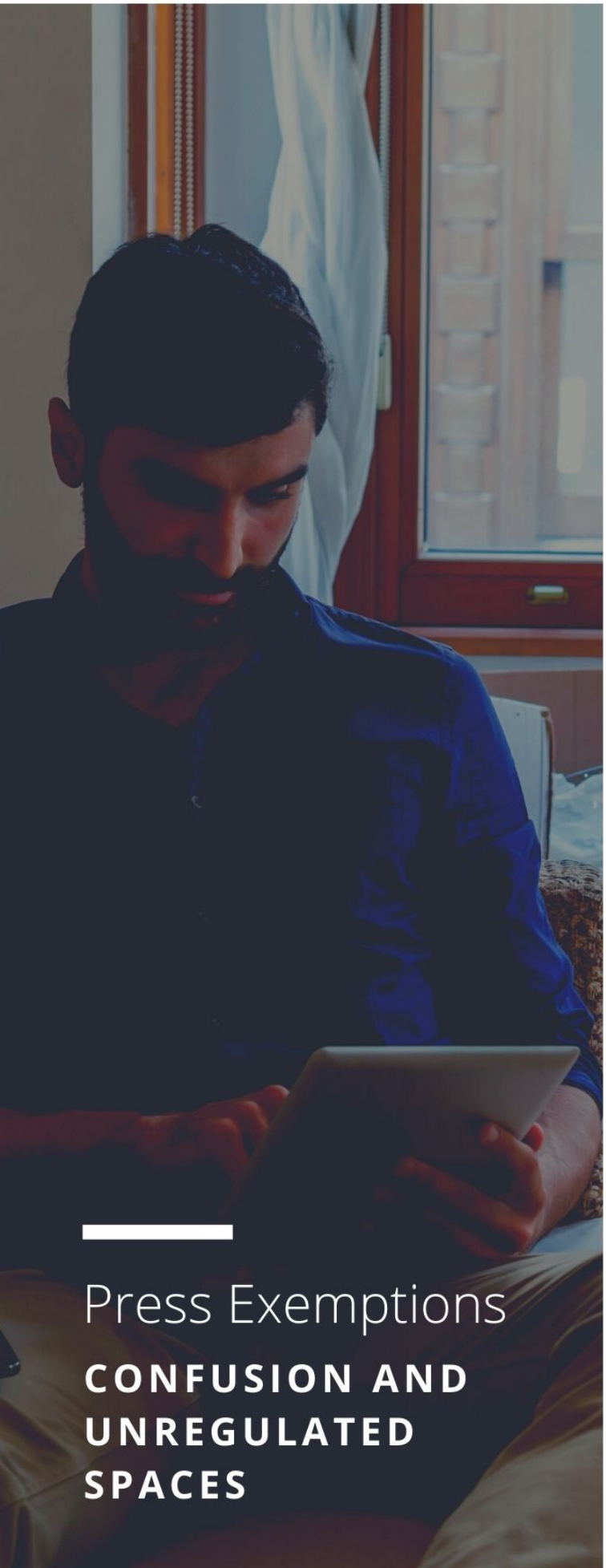
The bill sets out harms duties to be imposed upon user-to-user service providers (such as Twitter and Facebook), providers facilitating search engines (e.g. Google), or providers publishing certain types of pornographic content. These duties relate to responsibilities to address illegal content, content that is harmful to children, and content that is legal but harmful to adults.

However, while protection for online users is much needed and welcome, there are elements of the bill that will likely lead to confusion, inconsistencies, and gaps in protection that render the bill highly problematic.

Specifically, and for the purposes of this briefing, three key areas are in need of examination:

1. The potential of the bill to compound existing confusion and failings within the current press regulation system.
2. The bill's flawed approach to protecting democratic principles.
3. The bill's inadequate provisions to safeguard groups with protected characteristics designated under the Equality Act 2010.

Introducing THE ONLINE SAFETY BILL



Press Exemptions

CONFUSION AND UNREGULATED SPACES

The Online Safety Bill carries explicit exemptions for the press, supposedly under the guise of protecting journalistic freedoms. However, when examined within the wider context of the Government's overarching legislative and policy agenda, there is an argument to be made that the exemption can be more accurately traced to the close relationship between the Government and press ownership in the UK.

Indeed, while much Government rhetoric has been centred around protecting and advancing the freedom of speech, there are noticeable inconsistencies in how the Government approaches these issues in relation to newspapers. As but one recent example, outlined within their justification for dismantling the Human Rights Act 1998 is the Government's desire to expand protections for the free speech of the press through amending Section 12 to limit injunctions and other forms of relief being levied against the press. However, elsewhere in the proposals are numerous changes specifically aimed at restricting the protections for the free speech of protestors (a pattern of legislative hostility to dissenting free speech and democratic engagement that has echoes in the Police, Crime, Sentencing and Courts Bill).

Moreover, the Government's refusal to enact Section 40 of the Crime and Courts Act 2013 and scrapping of Part II of the Leveson Inquiry further underscores the Government's consistent attempts to shelter newspapers from accountability. With research demonstrating that only three companies (News UK, Daily Mail Group, and Reach PLC) control 90% of the national newspaper market, the relationship between powerful newspaper owners and the Government should thus be of vital concern when considering the reasons for its approach to the press within legislation and policy.

At this time, it is important to consider two broad and fundamental failings of the Online Safety Bill:

1. The exclusion of newspaper comments sections.
2. The exemption of news publisher content and conflict with the regulatory framework laid out by the Leveson Report and Royal Charter.

It is imperative that these failings be addressed if the bill is to achieve its aim of reducing harm for online users and society at large.

1. The exclusion of newspaper comments sections from regulation.

The Government's approach to social media sites encompasses user-to-user services on platforms such as Twitter or Facebook, where users can post content to be seen, engaged with, and responded to by other users. Such platforms, therefore, fall under the remit of the new legislation.

However, Part III, Section 49(2) and 49(6) of the bill clarify that comments sections on websites, including comments in response to the comments of other users, will remain outside the scope of regulation. Consequently, this excludes newspaper comments sections from any form of regulation.

This is a seemingly inconsistent approach and difficult to defend on account of the fact that comments sections on newspaper websites act in much as the same way as conversational spaces on other online platforms, such as Twitter. Moreover, it is within newspaper comments sections, such as that of the Daily Mail, that some of the most egregious forms of racism, Islamophobia, anti-semitism, xenophobia, sexism, homophobia, and anti-trans sentiments are found. This has been demonstrated numerous times, with one public experiment posting Nazi propaganda on the comments section of the Daily Mail. The experiment highlighted the popularity with which such rhetoric is received on the platform, with direct quotes from Adolf Hitler being "up-voted" amongst the comments.

However, the popularity of such statements on many newspaper comments sections should not be surprising considering the language and tone that is frequently used across newspapers themselves. The famous example of Katie Hopkins' 2015 article in the Sun, *Rescue boats? I'd use gunships to stop migrants,* referring to asylum seekers as "cockroaches", has echoes of the language used by the Third Reich against Polish people and against the Tutsis in the Rwandan Genocide. While this is a shocking example, it is far from an exception within mainstream newspaper publications, several of which demonstrate a pattern of prejudicial and sensationalist stories. Both The Sun and The Daily Mail were highlighted for criticism by the European Commission against Racism and Intolerance (ECRI), with tabloid newspapers accused of playing a "prominent role in encouraging prejudice" against vulnerable groups. The ECRI further referenced the UN High Commissioner for Human Rights observation that the UK had undergone decades of "sustained and unrestrained anti-foreigner abuse" in the press, and that "vicious verbal assault on migrants and asylum seekers in the UK tabloid press has continued unchallenged under the law for far too long".

Within such a landscape, it can be argued that far from newspaper websites and the content published providing merely a passive platform upon which such sentiments are expressed, but in reality actively mobilise prejudice, capitalising upon the emotional hysteria that fuels their readership.

As such, beyond being illogical to exclude comments sections from the standards placed upon platforms hosting similar user generated content, it is unconscionable to exclude newspaper comments sections from regulation considering their function as an active breeding ground for the harms that the Online Safety Bill is ostensibly designed to address.

Part III Section 49(2) of bill must, therefore, be amended to exclude the exemption for comments and reviews on provider content.

2. The exemption of news publisher content and conflict with the regulatory framework laid out by the Leveson Report and Royal Charter.

Beyond comments sections, Section 49(2) further excludes news publisher content originating from a "recognised news publisher". A recognised news publisher is defined within Section 50(2) as a publisher which:

- Publishes news-related material - defined in Section 50(5) as news, information, or opinion about current affairs as well as gossip about public figures.
- Publishes material that is subject to editorial control and under a code of standards - the entity has an editor and that editor is subject to a code of practice (which can be written by the entity itself).
- Has an established complaints process.
- Has a registered office or business address in the UK.
- Publishes the name and address of the person or entity that controls the publisher.

This exemption is further underscored by Section 16 which establishes duties for service providers to actively protect journalistic content - defined by

Section 16(8) as content that is "generated for the purposes of journalism". This includes specifying what procedures are in place to take into account the importance of the freedom of expression of journalistic content when handling complaints and applying sanctions against materials.

The exemption of news publisher content is a reasonable model if it rests upon the assumption that there are already robust and functioning mechanisms in place independent of the Online Safety Bill and which hold such content and publishers to account, thereby ensuring that journalistic standards are upheld. However, as the 2022 report from the Press Recognition Panel (PRP) concludes:

- **The current system is failing**: According to the PRP assessment, only IMPRESS provides an effective system of complaints and meets the standards required by the Royal Charter to be recognised as an approved regulator. However, IMPRESS is responsible for only a small proportion of UK publications (193 titles), with the majority of mainstream publications in the UK being under the remit of IPSO (2,600 publications), and several thousand major national, digital, and social media publications remaining completely outside of any system of independent regulation.
  At the same time, the Government's failure to enact Section 40 of the Crime and Courts Act 2013 denies the public access to justice through low-cost legal redress and removes vital incentives for a publishers to join a recognised regulator.
- **The public is not protected from press harm:** The PRP report observes widespread concerns regarding the behaviour and ethics of some news publishers, with victims of press abuse encompassing all ends of the social spectrum, from ordinary people, to politicians and celebrities. As mentioned, IPSO oversees the majority of mainstream publications in the UK but the PRP categorically states that "IPSO is not a regulator, and it manifestly does not meet the Royal Charter criteria. It is not independent of the industry. It does not provide the public with the necessary levels of protection intended following the Leveson Inquiry". Meanwhile, amongst those publications who have not joined either IMPRESS or IPSO, "most online and print news publishers [are left] with no regulation or external complaints handling process."
- **There are issues of ongoing Government interference and political misinformation:** In 2018, the Government announced its intention to repeal Section 40, which underpins the Royal Charter framework, thereby removing vital safeguards to the public protecting them from press abuse and providing a low-cost avenue to effective remedy. The Government provided no alternative to replace this important protection. Furthermore, the PRP reported a pattern of being forced to correct statements by government ministers and others about press regulation, having written to MPs 22 times in the space of 14 months regarding misleading information in Parliament, including correcting ministers "for wrongly stating that IPSO is a regulator".
- **Systems for making press complaints are arbitrary, confusing, and inconsistent:** Due to the lack of incentives to join an approved regulator, the PRP notes that "there are dozens, if not hundreds, of confusing systems, and the quality is inconsistent. Many publications, including many significant publishers and publications, do not have any processes at all." As such, members of the public must navigate confusing and convoluted systems that can require a protracted length of time and resources; a task that is compounded if a story has been replicated across several publishers and they are faced with having to engage with multiple processes (if a route to complaint exists at all).

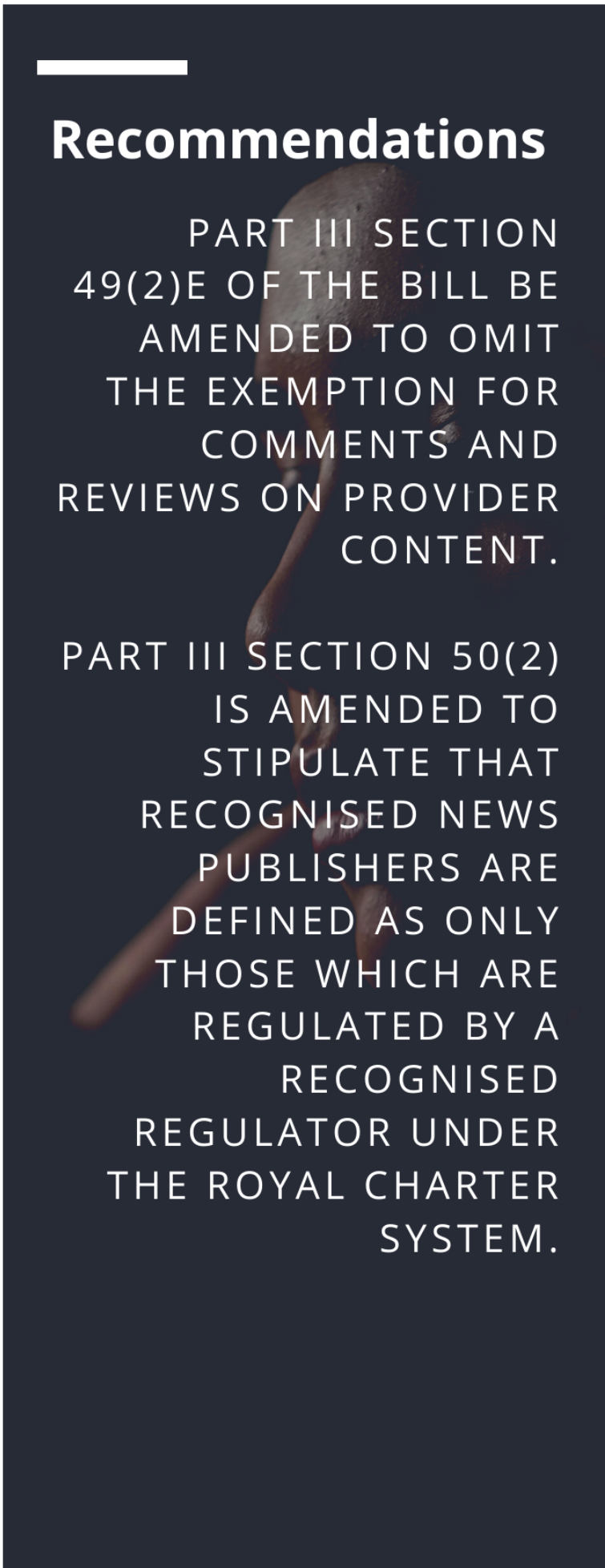
The Online Safety Bill could be an opportunity to strengthen journalistic standards by bringing online and social media news publishers under the Royal Charter. Failure to do so merely risks increasing the complexity of an already confusing landscape and leaves vast swathes of online content unregulated.

This is particularly concerning in light of Section 50's broad definition of a recognised news publisher. Under these conditions, it would be very easy for entities to claim the status of a news publisher despite publishing factually incorrect, prejudicial, and harmful but legal content whilst sheltering from accountability behind an editors code that the entity itself has produced - a defence that essentially rests upon abiding by the rules that the entity has set for itself.

The only mechanism to counter the danger of Section 49 exemptions being applied to such

entities is to ensure that Section 50(2) is amended to stipulate that only news publishers which are regulated under the Royal Charter system will be recognised. This amendment would prohibit agents of disinformation and hatred from accessing the Section 49 exemption while ensuring that all publications that are regulated under a recognised system can benefit from the exemption. Furthermore, this amendment would reinforce the Royal Charter system and provide an incentive for online publishers to join an approved regulator.

Those who choose not to join a regulator would still enjoy the protections of the duties to uphold freedom of expression that is contained within the bill.



Recommendations

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PART III SECTION 50(2) IS AMENDED TO STIPULATE THAT RECOGNISED NEWS PUBLISHERS ARE DEFINED AS ONLY THOSE WHICH ARE REGULATED BY A RECOGNISED REGULATOR UNDER THE ROYAL CHARTER SYSTEM.

There are several areas of the bill that present the potential for inconsistencies and confusion when dealing with competing user rights. For the purposes of this briefing, there are two areas of particular concern:

1. The protection of content of democratic importance.
2. The definition of harms.

1. Protecting content of democratic importance.

Part III Section 15 of the Online Safety Bill outlines a duty upon service providers to protect the free expression of content of democratic importance. While protecting free expression and democratic speech is a laudable aim, the bill fails to engage with existing inequalities that are pervasive throughout online spaces and which actively prevent a variety of groups with protected characteristics from engaging in democratic discourse on an equal footing. In particular, there is a lack of acknowledgement of the role of hatred, abuse, harassment, and discrimination which numerous studies have demonstrated create barriers and exclude women and minority groups and which fundamentally threaten democratic principles.

Therefore, the bill's approach of prioritising freedom of expression is not reflective of the harms landscape. This is an especially important consideration in light of the fact that the definition provided for content of democratic importance is exceptionally vague. Section 15(6) defines such content as content that "is or appears to be specifically intended to contribute to democratic political debate in the United Kingdom or a part or area of the United Kingdom." The broad scope of such a definition leaves significant concern of abuse, with many forms of discrimination and harassment (especially against minorities and stigmatised or scapegoated communities) being argued to be part of legitimate democratic and political debate. This vague definition also raises concern that a two-tier approach to entitlement to free expression, with politicians and journalists (including those who are self-styled as journalists, for example Tommy Robinson) being given significant lenience in comparison with ordinary citizens, despite potentially representing speech that carries the greatest harm and a reach that far exceeds the average user.

Instead, the bill should take its lead from the approach found in Article 10 and Section 12 of the Human Rights Act 1998. The protections afforded by the Human Rights Act provide enhanced protection for the freedom of expression, whilst acknowledging that it is a qualified right.

Balancing COMPETING RIGHTS AND PROTECTING DEMOCRACY

Therefore, it provides a clear process for ensuring that any restriction is lawful, necessary, and proportionate to achieving a legitimate aim, such as protecting the rights of others. In this case, there is an acute need to balance freedom of expression with the need to protect minority communities from discrimination and barriers to their equal enjoyment of rights and freedoms.

The key to this protection is balancing freedom of expression, rather than prioritising it. Thus, the Human Rights Act remains the strongest framework though which to holistically protect the rights of online users. Parliamentarians must, therefore, scrutinise the bill for its human rights implications and, particularly in light of the Government's current attempts to overhaul the Human Rights Act, defend the Act as the vital protective mechanism for all individuals, whether in public or online spaces.

2. Defining harm.

Section 187 of the bill defines harm as physical or psychological harm arising from the nature of content or its dissemination such that it increases the likelihood of an individual harming themselves or others. This exceptionally broad definition is compounded by the wide scope afforded by Section 54 to the Secretary of State to designate priority content that is legal but harmful to adults through secondary legislation, as well as their role in the drafting of the Ofcom code of practice in Section 37(6), and their ability to revise the online safety objectives under Schedule 4.

The lack of clarity provided regarding the specific types of harm that will be covered exposes a potential for certain forms of harm to be overlooked. Section 12(5) of the bill requires the prescribed risk assessment duties to take into account "priority content that is harmful to adults which particularly affects individuals with a certain characteristic or members of a certain group". However, beyond children, these groups have not been stipulated.

At the same time, Section 65 states that, when producing guidance, Ofcom must consult with individuals and organisations that represent the interests of groups with protected characteristics. However, there is no published framework outlining how these entities are to be selected for engagement. This is a particularly poignant problem for Muslim communities.

Firstly, within political and policy circles there is a frequently held misconception that there is a singular homogenous British Muslim community, leading to a very narrow quest for 'gatekeepers' that represent the whole community. However, a unified British Muslim community does not exist. In reality, British Muslim communities hold a rich demographic diversity on every intersectional variable, including ethnicity, practice, theology, language, and culture. Therefore, any engagement necessitates an incredibly broad and inclusive range of voices to truly understand the experience and interests of these communities.

Secondly, this difficulty in engaging representative Muslim voices is compounded by the fact that the Government actively disengages from any Muslim organisation that does not support its existing policy positions. Therefore, organisations that have little or no credibility within Muslim communities have traditionally held a disproportionate influence in policymaking, further embedding a sense of exclusion and alienation amongst communities themselves. Therefore, particular attention must be paid to how Ofcom will be required to consult and include a vast range of diverse voices.

At the same time, there is also scope for political over-reach and interference with freedom of expression, especially considering the role of the Secretary of State and the risk of priority harms categories becoming politicised and potentially expanded to include content that is hostile to the Government and its policies. This is a particularly notable concern in the context of large swathes of ongoing legislative proposals that appear tailored to limit political opposition, with the Police, Crime, Sentencing and Courts Act and plans to reform the Human Rights Act being but two pressing examples. As a result, attention should be paid to the Secretary of State's control over Ofcom and whether its independence can be fully assured. As such, in light of the threat to democratic principles, it is vital that all powers granted to the Secretary of State to direct Ofcom be removed with the singular exception of matters relating to national security.

From both the perspective of ill-defined types of harm and from the potential for political interference with freedom of expression, the lack of clarity surrounding the definition of harm will disproportionately impact already marginalised communities who experience existing barriers to online engagement, either through targeted harassment or disproportionate policing online.

Consequently, it is again important that content

that is legal but harmful for adults is framed within the prism of Article 10 of the Human Rights Act and the European Convention on Human Rights. It is only within this framework that competing rights can be balanced and protected.

Furthermore, beyond merely focussing on how content is treated within the terms of service, a human rights framing must be combined with a systems-based approach. In other words, systems themselves (including user-profiling, content curation, and content moderation) must also be scrutinised to address the replication and entrenchment of inequality that is so often observed within algorithms and platform designs.

Recommendations

THE PROTECTION FOR CONTENT OF DEMOCRATIC IMPORTANCE IN SECTION 15 IS REMOVED.

THE ONLINE SAFETY OBJECTIVES ARE UPDATED TO INCLUDE EXPLICIT PROTECTION FOR HUMAN RIGHTS IN LINE WITH THE HUMAN RIGHTS ACT AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS.

PLANS TO OVERHAUL THE HUMAN RIGHTS ACT ARE SCRAPPED.

THE POWERS GRANTED TO THE SECRETARY OF STATE TO DIRECT OFCOM BE REMOVED, WITH THE SINGULAR EXCEPTION OF MATTERS RELATING TO NATIONAL SECURITY.

Conclusions

While the Online Safety Bill has significant potential, the press exemption and powers granted to the Secretary of State expose extensive risks to minority communities and democratic principles if left in their current forms.

If the definition under Section 50 is amended, the bill represents a significant opportunity to uphold the Royal Charter by providing an incentive for publishers to join a Leveson compliant regulator. However, in its current form, and when combined with the exemption for comments sections, the bill is powerless to address the prolific instances of press harm across society.

At the same time, and in light of a pattern of legislation designed to undermine Government accountability, remove scrutiny, and restrict political dissent, the powers granted to the Secretary of State can only be met with alarm.

Beyond these issues, there is an urgent need to provide clarity to the definition of harms and how groups with protected characteristics are to be consulted and engaged within the drafting of Ofcom guidance.

Ultimately, the central question that the Online Safety Bill seeks, and unfortunately fails, to address is how to protect individual users from abuse and harassment while simultaneously protecting the freedom of expression. The approach through which it attempts this is one of prioritisation of rights. This is misguided and will ultimately fail to sufficiently protect vulnerable groups. The correct approach is one of balance found within the Human Rights Act. The Human Rights Act should be the basis upon which the Online Safety framework is built as it provides robust guidance for balancing conflicting rights and ensure that any restriction is lawful, necessary, and proportionate.

However, in light of the Government's current plans to dismantle the Human Rights Act, Parliamentarians are now faced with the task of vigorously protecting the Act if we are to benefit from a workable Online Safety strategy.


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